IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NEIL TROPIANO	:	CIVIL ACTION
	:	
v.	:	
	:	
PENNSYLVANIA STATE POLICE, et al.	:	NO. 06-1569

MEMORANDUM

Bartle, C.J. July 24, 2006

Plaintiff Neil Tropiano ("Tropiano") brings this action against the Pennsylvania State Police, State Police Commissioner Jeffrey B. Miller ("Commissioner Miller") and State Police Bureau of Human Resources Director Lisa Bonney ("Director Bonney"). He alleges that defendants denied him a position as a Pennsylvania State Police cadet for which he was otherwise qualified and that they did so solely on the basis of his condition as a diabetic. He seeks money damages as well as injunctive relief against defendants under the Rehabilitation Act, 29 U.S.C. § 794, 42 U.S.C. § 1983, and the Pennsylvania Human Relations Act ("PHRA"), 43 Pa. Cons. Stat. Ann. § 955.

Before the court is the motion of defendants made pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the § 1983 claims against Commissioner Miller and Director Bonney for failure to state a claim upon which relief can be granted. Defendants also move to dismiss the § 1983 claims on the ground that even if plaintiff has properly pleaded

his § 1983 claims they are entitled to qualified immunity as public officials. In the alternative, pursuant to Rule 12(e), defendants seek a more definite statement on some of the § 1983 claims.

I.

Under Rule 12(b)(6), a claim should be dismissed only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. Cal. Pub. Employees' Ret. Sys. v. Chubb Corp., 394 F.3d 126, 143 (3d Cir. 2004). In considering a motion to dismiss for failure to state a claim, we accept as true all well-pleaded facts in the complaint and draw any reasonable inferences in plaintiff's favor. See Hishon v. King & Spalding, 467 U.S. 69, 73 (1984); Oshiver v. Levin, Fishbein, Sedran & Berman, 38 F.3d 1380, 1384 (3d Cir. 1994). We should grant the motion only if "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations" contained in the complaint. Id.

We accept as true the following allegations in the complaint. See, e.g., Chubb Corp., 394 F.3d at 143. In early 2004 Tropiano took and passed both the written and oral exams required to apply for a position as a State Trooper in Pennsylvania. As a result, in July 2004 he received a conditional offer of employment for the position of Pennsylvania State Police cadet pending the successful completion of certain remaining selection procedures. Plaintiff proceeded to pass a

urinalysis screening, physical fitness test, polygraph test, and background investigation. In September 2004, Bonney, the State Police Bureau of Human Resources Director, informed Tropiano that he had successfully completed the background investigation phase of the application process and needed only to undergo a medical and psychological evaluation in order to be accepted as a cadet.

In October 2004, plaintiff underwent both a medical and psychiatric evaluation at which time he informed the examining physician that he suffers from Type 1 "insulation-dependant" diabetes. Following this examination, Director Bonney advised plaintiff that the State Police Medical Office recommended that he be disqualified from the cadet application process as a result of his diabetes. Accordingly, his name was removed from the cadet eligibility list. Despite a report by plaintiff's personal physician, Steven B. Nagelberg, M.D., that plaintiff's diabetes would not interfere with his ability to perform any type of job, Director Bonney notified plaintiff in January 2005 that he would not be reinstated to the eligibility list.

As noted above, Tropiano asserts violations of the Rehabilitation Act, 42 U.S.C. § 1983, and the PHRA. His § 1983 claims against defendants are predicated on alleged violations of his civil rights pursuant to: (1) the Privileges and Immunities Clause of the Fourteenth Amendment; (2) the Equal Protection Clause of the Fourteenth Amendment; (3) the Due Process Clause of the Fourteenth Amendment; and (4) the Rehabilitation Act. Despite the fact that plaintiff seeks money damages and various

injunctive relief under his separate PHRA and Rehabilitation Act claims, he pursues only money damages under § 1983. As such, we will construe the § 1983 claims against the defendants only in their personal, as opposed to official, capacities. See Melo v. Hafer, 912 F.2d 628, 636 (3d Cir. 1990).

Defendants make several arguments in their motion to dismiss. First, we consider whether plaintiff has sufficiently alleged the requisite involvement by Commissioner Miller upon which to ground § 1983 liability. In Monell v. Department of Social Services, the Supreme Court held that a municipality cannot be held liable under § 1983 under a theory of respondeat superior. See 436 U.S. 658, 691-94 (1978). Our Court of Appeals has explained that a government official or employee in a civil rights action "must have personal involvement in the alleged wrongdoing" because § 1983 liability "cannot be predicated solely on the operation of respondeat superior." See, e.g., Evancho v. Fisher, 423 F.3d 347, 352 (3d Cir. 2005). "Personal involvement can be shown through allegations of personal direction or of actual knowledge and acquiescence." Id. at 352.

We agree with plaintiff that he need only satisfy the liberal pleading standard contained in Rule 8(a). See, e.g., Leatherman v. Tarrant Cty. Narcotics Intelligence & Coordination Unit, 507 U.S. 163, 164 (1993); Abbott v. Latshaw, 164 F.3d 141 (3d Cir. 1998). Even so, our Court of Appeals has held that a § 1983 complaint against a state official is adequate only "where it states the conduct, time, place, and persons responsible."

Evancho, 423 F.3d at 352. Reading the complaint liberally, it still fails to allege facts that, if proven, would show Commissioner Miller's personal involvement in the withdrawal of the conditional offer of employment to plaintiff. Here, plaintiff's complaint contains scant reference to any conduct by the Commissioner. It makes only general and vague allegations that "Defendants made a conditional offer of employment" (Compl. ¶ 13) and "Defendants regarded Plaintiff as being impaired due to his diabetes" (id. ¶ 23). Plaintiff includes no allegations regarding any written or oral communication with Commissioner Miller and at no point avers that the Commissioner was involved in the decision to withdraw any conditional offer of employment. Plaintiff contends that the Commissioner "knowingly and intentionally deprived" him of certain federal constitutional rights but provides no information regarding any conduct, time, place or manner in which the Commissioner may have done so. See Evancho, 423 F.3d at 352.

Plaintiff correctly points out that our Court of Appeals has recognized that § 1983 supervisory liability may attach if the supervisor "implemented deficient policies and was deliberately indifferent to the resulting risk or the supervisor's actions and inactions were 'the moving force' behind the harm suffered by the plaintiff." See Sample v. Diecks, 885 F.2d 1099, 1117-18 (3d Cir. 1989). There is no allegation in the complaint that the Commissioner was responsible for any such policy or that he was the "moving force" behind the decision not

to hire plaintiff. To the contrary, there is not even an allegation that the Commissioner knew of plaintiff's application.

The allegations against Commissioner Miller contained in the complaint appear to us highly analogous to those in Evancho. There, the plaintiff brought a § 1983 action against the Pennsylvania Attorney General alleging retaliatory discharge for certain whistleblowing activities. The only allegation in her complaint directed at the Attorney General was that her transfer "was carried out by underlings reporting directly to the attorney general and/or by the attorney general himself for the explicit purpose of either setting [plaintiff] up for dismissal or, if that were not successful, making her work life so miserable as to force her resignation." See 423 F.3d at 350. The Court of Appeals affirmed the district court's dismissal of the § 1983 claim against the Attorney General because the complaint failed to allege facts that showed "personal involvement" or even "contemporaneous, personal knowledge" of plaintiff's allegedly discriminatory transfer. See 423 F.3d at 353. Likewise, here, plaintiff has not alleged any contemporaneous personal knowledge by Commissioner Miller of the decision not to hire him as a result of his diabetes. No factual allegation even mentions the Commissioner by name. Accordingly, there is no basis for § 1983 liability for Commissioner Miller, and the § 1983 claims against him must be dismissed.

Second, we address whether plaintiff has sufficiently alleged a violation of the Due Process Clause of the Fourteenth

Amendment upon which to base his § 1983 claim against Director Bonney. It is unclear from the complaint whether plaintiff is alleging a violation of his substantive or procedural due process rights. In his response to the motion to dismiss, plaintiff argues only procedural due process, and we will limit our consideration of plaintiff's allegations to that theory. When a plaintiff sues under § 1983 for a state actor's failure to provide procedural due process, we must employ the two-stage analysis outlined by our Court of Appeals in Robb v. City of Philadelphia, 733 F.2d 286, 292 (3d Cir. 1984). This analysis requires us to inquire (1) whether "the asserted individual interests are encompassed within the Fourteenth Amendment's protection of 'life, liberty, or property'"; and (2) whether the procedures available provided the plaintiff with "due process of law." Id. at 292; see also Alvin v. Suzuki, 227 F.3d 107, 116 (3d Cir. 2000).

Defendants contend that because plaintiff received only a conditional offer of employment, he lacks the required property interest under the Fourteenth Amendment to assert his due process claim. We agree. The complaint states that plaintiff was informed that "in order to receive an offer of employment," he still had to "successfully complete the remaining cadet selection process," consisting of the medical and psychological evaluations. A property interest in state employment exists only "where an employee has a legitimate claim of entitlement to such employment under state law, policy, or custom." Sanguigni v.

Pittsburgh Bd. of Public Educ., 968 F.2d 393, 401 (3d Cir. 1992). An offer of employment that is conditioned on the successful completion of certain remaining steps in an application process can hardly be said to give plaintiff a "legitimate claim of entitlement" to that employment. Plaintiff has cited no authority, and we have found none, suggesting that an applicant has a Fourteenth Amendment property interest in a conditional offer of employment. Therefore, the § 1983 claim against Bonney based on an alleged due process violation must also be dismissed.

Third, we turn to the question whether the § 1983 claim based on an alleged violation of the Privileges and Immunity Clause of the Fourteenth Amendment against Bonney is sufficiently pleaded. Plaintiff offers no response and cites no authority on this point. In any event, we find there is no basis for any violation of the Privileges and Immunities Clause. That section of the Constitution provides that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." See U.S. Const. amend. XIV, § 1. As our Court of Appeals has concluded, "the Privileges and Immunities Clause of the Fourteenth Amendment 'has remained essentially moribund' since the Supreme Court's decision in The Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1872), and the Supreme Court has subsequently relied almost exclusively on the Due Process Clause as the source of unenumerated rights." See In re Sacred Heart Hosp., 133 F.3d 237, 244-45 (3d Cir. 1998). Thus, there is no basis for a § 1983 claim against Bonney based

on any alleged deprivation of plaintiff's privileges and immunities.

Fourth, defendants maintain that a violation of the Rehabilitation Act cannot serve as the basis for a civil rights action pursuant to § 1983. We disagree. When the rights sought to be enforced by a § 1983 action are statutory, the claim is impermissible only when "Congress intended to foreclose such private enforcement." Wright v. Roanoke Redevelopment & Hous. Auth., 479 U.S. 418, 423 (1987). Our Court of Appeals has explicitly permitted a plaintiff to seek money damages directly under § 504 of the Rehabilitation Act as well as under § 1983 based on the underlying violation of § 504. See W.B. v. Matula, 67 F.3d 484, 494 (3d Cir. 1995). According to Matula, Congress did not intend § 504 of the Rehabilitation Act to be the exclusive remedy for persons with disabilities.

II.

Next, we must decide whether Director Bonney is protected by qualified immunity on the § 1983 claim based on the alleged violation of the Rehabilitation Act. A public official's otherwise illegal actions are protected by qualified immunity only if he or she can show that the alleged offending conduct did not "violate clearly established statutory or constitutional rights which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). In Saucier v. Katz, 533 U.S. 194 (2001), the United States Supreme Court established a two-step process for evaluating claims of qualified immunity.

First, we must determine whether the facts "taken in the light most favorable to the party asserting the injury ... show the officer's conduct violated a constitutional right." Id. at 201. Second, if the answer to the first question is affirmative, we then must decide as to "whether the right was clearly established" such that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." Id. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition." Id. Nevertheless, "the plaintiff need not show that there is a prior decision that is factually identical to the case at hand in order to establish that a right was clearly established." Doe v. Groody, 361 F.3d 232, 243 (3d Cir. 2004).

Under the first prong of Saucier, we turn to the question of whether plaintiff has alleged a sufficient statutory violation. Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified individual with a disability ... shall, solely by reason of her or his disability, be excluded from the participation in any program or activity receiving Federal financial assistance." See 29 U.S.C. § 794(a). To establish a prima facie case of discrimination under the Rehabilitation Act, a plaintiff bears the burden of demonstrating: "(1) that he or she has a disability; (2) that he or she is otherwise qualified to perform the essential functions of the job, with or without reasonable accommodations by the employer; and (3) that he or she was nonetheless terminated or otherwise prevented from performing

the job." Donahue v. Consol. Rail Corp., 224 F.3d 226, 229 (3d Cir. 2000).

The only point of contention between the parties centers on whether plaintiff has a qualifying disability under the Rehabilitation Act. Plaintiff alleges that he suffers from Type 1 "insulation-dependant" diabetes that substantially limits him in "the major life activity of, among others, eating." Plaintiff also alleges that the sole reason he was disqualified from the cadet application process was his disclosure during his medical examination that he has diabetes. Defendants respond that diabetes has been frequently found by other courts not to constitute a "disability" and that we should follow suit in the instant matter. See, e.g., Shultz v. Potter, 142 Fed. Appx. 598 (3d Cir. 2005); Mikruk v. U.S. Postal Serv., 115 Fed. Appx. 580 (3d Cir. 2004). Under the Rehabilitation Act, a "disability" is defined as: (1) "a physical or mental impairment that substantially limits one or more of the major life activities of such individual"; (2) "a record of such an impairment"; or (3) "being regarded as having such an impairment." See 42 U.S.C. § 12102(2); see also Sutton v. United Air Lines, 527 U.S. 471, 478 (1999).

The complaint does not allege that plaintiff suffers from a substantial limitation of a major life activity. The Rehabilitation Act does not protect persons with impairments "mitigated by corrective measures," Sutton, 527 U.S. at 487, and plaintiff plainly states in his complaint that his condition is

"controlled by a regimen of insulation injections before meals" and that his "treatment allows a great deal of flexibility." Nonetheless, plaintiff has sufficiently pleaded that he at least was regarded by Bonney as being impaired under the Rehabilitation Act when his conditional offer of employment was revoked for the sole reason of his diabetes. This is sufficient to state a claim under the Rehabilitation Act. See 42 U.S.C. § 12102(2)(C).

Under the second prong of Saucier, our analysis turns to the question whether the right in question was clearly established at the time of the offending conduct, that is, whether plaintiff had the right to be free from being regarded as impaired as a result of his diabetes. The law clearly required Bonney to make an individualized assessment of plaintiff's disability prior to withdrawing the conditional offer of employment. In Sutton, decided in 1999, the Supreme Court determined that "the question whether a person has a disability under the [the Americans with Disability Act ("ADA")] is an individualized inquiry." See 527 U.S. at 472. Because the substantive standards of the Rehabilitation Act have consistently, and prior to the events in issue, been interpreted identically to those contained in the ADA, the law clearly put defendants on notice that an individualized inquiry was required in addressing plaintiff's condition. See, e.g., McDonald v. Pennsylvania, 62 F.3d 92, 94 (3d Cir. 1995). Before the court we have plaintiff's allegations that Director Bonney ignored a letter from his personal physician stating his ability to perform

the job in question despite his diabetes. Without more, we cannot say that she made the required individualized assessment in revoking plaintiff's conditional offer of employment. Accordingly, the motion to dismiss on the grounds that Director Bonney is entitled to qualified immunity against plaintiff's § 1983 claim arising under an alleged violation of the Rehabilitation Act will be denied without prejudice pending further development of the record.

III.

Defendants move in the alternative under Rule 12(e) for a more definite statement on plaintiff's § 1983 claims arising from the alleged deprivation of rights under the Privileges and Immunities Clause and Due Process Clause of the Fourteenth Amendment. Since we have already determined plaintiff's § 1983 claims based on those two clauses will be dismissed, the motion for a more definite statement will be denied as moot.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NEIL TROPIANO	:	CIVIL ACTION
	:	
v.	:	
	:	
PENNSYLVANIA STATE POLICE, et al.	:	NO. 06-1569

ORDER

AND NOW, this 24th day of July, 2006, for the reasons set forth in the accompanying Memorandum, it is hereby ORDERED that:

(1) the motion of defendants Jeffrey B. Miller and Linda Bonney to dismiss is GRANTED in part and DENIED in part;

(2) the motion of defendant Jeffrey Miller to dismiss all the claims against him arising under 42 U.S.C. § 1983 is GRANTED;

(3) the motion of defendant Linda Bonney to dismiss the claims against her arising under 42 U.S.C. § 1983 alleging violations under the Privileges and Immunities Clause and the Due Process Clause is GRANTED;

(4) the motion to dismiss is otherwise DENIED; and

(5) the motion of the defendants, in the alternative, for a more definite statement on plaintiff's claims under 42 U.S.C. § 1983 alleging violations under the Privileges and

Immunities Clause and the Due Process Clause of the Fourteenth Amendment is DENIED as moot.

BY THE COURT:

/s/ Harvey Bartle III
C.J.